Shaik Alauddin v Kamarutheen a/l K Dawood

HIGH COURT (KUANTAN) – CIVIL SUIT NO 22-8-87
LAMIN J
20 MAY 1988

Civil Procedure – Summary judgment – Deed of assignment – Defendant in breach of agreement in refusing to vacate and deliver up premises – Application for injunction to restrain defendant from trespassing or possessing premises – Whether assignment of whole premises illegal – Whether tenancy or mere licence – Rules of the High Court 1980, O 14 & O 15 r 4 – Specific Relief Act 1950, s 54(1)

This is an application by the plaintiff for summary judgment for (a) an injunction to restrain the defendant by himself his servants and/or agents from trespassing and/or remaining in possession of the premises No 73, Jalan Mahkota, Kuantan, Pahang; (b) delivery of vacant possession of the said premises; (c) inquiry as to damages; and (d) costs.

The plaintiff was a partner in a firm managed by the defendant in the said premises. By a deed of assignment dated 28 September 1983, the plaintiff became the tenant of the said premises. Pursuant to an agreement dated 17 May 1986, the plaintiff and the other partners of the firm withdrew from the said firm in favour of the defendant. It was a term of the agreement that the defendant would vacate and deliver possession of the said premises on or before 31 December 1986. The defendant in breach of this agreement refused to vacate and deliver possession and continued to be in occupation.

Held, allowing the application:

(1) The court was not convinced how the question of illegality of the assignment could be of assistance to the defendant in opposing this application. If the assignment was illegal, all the more the defendant ought not to continue remaining in occupation.

(2) From the facts of the case, no tenancy of any kind was intended to be created in favour of the defendant before 31 December 1986. At best, only a mere licence was envisaged conditional on the defendant's vacating the premises by 31 December 1986. Thereafter he became a trespasser. The defendant was given only a personal privilege to remain just to give him time to make all the preparations to leave.

(3) The court saw no reason why an injunction cannot be issued against the defendant despite s 54(1) of the Specific Relief Act 1950.

(4) Order in terms of the application was granted with damages to be assessed by the senior assistant registrar.

Cases referred to

1 *Lee Thin Pung* v *Lim Seang Kee & Anor* [1949] MLJ 69 (not follid)
2 *Shell-Mex & BP Ltd* v *Manchester Garages Ltd* [1971] 1 All ER 841 (follid)
3 *Woo Yew Chee* v *Yong Yong Hoo* [1979] 1 MLJ 131 (follid)

Legislation referred to

Control of Rent Act 1966
Rules of the High Court 1980 O 14, O 15 r 4(2)
Specific Relief Act 1950 s 54(1)

M Pathmanathan for the plaintiff.
Wong Fook Yong for the defendant.

Cur Adv Vult

Lamin J: This is an application by the plaintiff for summary judgment under O 14 (encl 5) praying for:

(a) an injunction to restrain the defendant by himself his servants and/or agents from trespassing and/or remaining in possession of the premises No 73, Jalan Mahkota, Kuantan, Pahang;
(b) delivery of vacant possession of the said premises;
(c) inquiry as to damages; and
(d) costs.

The plaintiff in this case was a partner in the firm known as Syarikat Aman which was managed by the defendant. The firm carried on its business at No 73, Jalan Mahkota, Kuantan, Pahang Darul Makmur. By a deed of assignment dated 28 September 1983 (exh 'SA-1' to encl 5) the plaintiff became the tenant of the said premises.

Pursuant to an agreement dated 17 May 1986 (exh 'SA-2' to encl 5) the plaintiff and the other partners of Syarikat Aman withdrew from the said firm in favour of the defendant. It was a term of the agreement that the defendant would vacate and deliver up possession of the said premises on or before 31 December 1986. The defendant in breach of this agreement refused to vacate and deliver up possession and continued to be in occupation. Hence the present action. The plaintiff now comes before the court to apply for summary judgment as the circumstances of the case merit the application.

Counsel for the defendant/respondent argued, inter alia, that the plaintiff was not entitled to possession on the ground that by cl 4 of the 1986 agreement (exh 'SA-2'), the second party (ie the defendant) was to deliver up vacant possession to the first party (the plaintiff and three others) and not to the plaintiff alone. I found no merit in this argument because in the first place he was not denying that the defendant by that agreement was bound to deliver vacant possession by 31 December 1986.

The matter of possession of the said premises as between the plaintiff and the three others was not the concern of the defendant. In fact Syarikat Aman's (a partnership of four, namely, the plaintiff and the three others) occupation of the premises for the purpose of carrying on its business was facilitated simply by the tenancy acquired by the plaintiff under the deed of assignment of 1983. Without that deed of assignment, the Syarikat and for that matter the defendant (manager of the Syarikat) could not have been on the premises.

At the same time, counsel for the defendant/respondent contended that for the reason that the 'first party' referred to under the 1986 agreement being comprised of the plaintiff and three others, the plaintiff must first initiate the joining of the other three persons as required under O 15 r 4(2) of the Rules of the High Court 1980 unless he has had leave of the court. I do not see the necessity for submitting to the requirement of the said

order in view of the circumstances of this case and that none of the plaintiff's partners has intervened.

Also, the counsel contended that the deed of assignment of 1983 was an assignment of the whole premises and therefore illegal under the Control of Rent Act 1966 and cited the case of *Lee Thin Pung* v *Lim Seang Kee & Anor*.[1]

If the assignment was illegal, all the more the defendant ought not to continue remaining in occupation as his presence was made possible because of his employment in Syarikat Aman. I am not convinced how the question of illegality of the assignment can be of assistance to the defendant in opposing this application.

The defendant had direct interest in the premises only under the 1986 agreement wherein he was cited as the second party. To determine their relationship in that whether it arose out of a tenancy or a licence one has to ascertain the nature of the transaction: *Shell-Mex & BP Ltd* v *Manchester Garage*[2] and *Woo Yew Chee* v *Yong Yong Hoo*.[3] By virtue of cl 4 of the agreement, the defendant was to vacate the premises on or before 31 December 1986. Clause 4 reads:

> The second party shall vacate and deliver up possession of the whole of the premises known as No 73, Jalan Mahkota, Kuantan, to the first party and remove all his goods and stocks only from the said premises on or before 31 December 1986. It is further mutually agreed that the second party's occupation of the said premises until 31 December 1986 or such earlier date as the case may be shall in no way be deemed to be or construed to be a tenancy or subtenancy of the said premises or licence to occupy the said premises or to confer any right whatsoever under any prevailing law to occupy and continue to remain in occupation of the said premises.

I am in agreement with the counsel for the plaintiff/applicant with regard to the reading of cl 4. In fact no tenancy of any kind was intended to be created in favour of the defendants before 31 December 1986. At best, he contended, only a mere licence was envisaged conditional on the defendant's vacating the premises by 31 December 1986. The Federal Court in the case of *Woo Yew Chee* v *Yong Yong Hoo*[3] reiterated the test enunciated earlier by which to ascertain whether a tenancy or merely a licence was intended to be created and I quote (p 133):

> The ultimate test is the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sublet or whether he should have only a personal privilege...

The 1986 agreement was entered into on 17 May 1986 and by 31 December of that year, the defendant was to vacate the premises taking away with him the partnership business after having paid the compensation as agreed in respect of the said business to the plaintiff and his partners. The purport of the agreement was simply that the defendant was to take over the business and then leave the premises. The defendant had no right or stake in the premises. He was given only a personal privilege to remain just to give him time to make all the preparations to leave. Because the defendant refused to leave after 31 December 1986, he had thereafter become a trespasser.

Finally, counsel for the defendant/respondent argued that s 54(1) of the Specific Relief Act 1950 would not allow an injunction to issue in view of the circumstances of this case as this is not a case of breach of trust. The said provision reads:

> An injunction cannot be granted – (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust.

In the present case, after 31 December 1986, the defendant had no business to be on the premises any longer and since that day he had therefore become a trespasser. On the authority of the case of *Shell-Mex & BP Ltd* v *Manchester Garages Ltd*,[2] I see no reason why an injunction cannot issue against the defendant.

In the circumstances, I therefore granted an order in terms of the application with damages to be assessed by the senior assistant registrar.

Order accordingly.

Solicitors: *Yusuf Lee Pathma & Marbeck*; *Wong & Associates.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Chan Ah Kow & Anor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 39 OF 1984
KC VOHRAH J
26 APRIL 1988

Criminal Law – Dangerous drugs –Trafficking in – Common intention – First accused acquitted at close of prosecution case – Prima facie case against second accused – Presumption – Defence of no knowledge – Dangerous Drugs Act 1952, s 39 B(1)(a) & (2) – Penal Code (FMS Cap 45), s 34

The first and second accused were charged with trafficking in dangerous drugs, ie 1,599.74g of heroin on their own behalf on 23 May 1984 at the 4th mile, Jalan Cheras, Kuala Lumpur, in furtherance of their common intention in contravention of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952, read with s 34 of the Penal Code. The police had acted on information, laid an ambush at the Taman Midah roundabout and spotted the motorcycle of the two accused proceeding towards the roundabout. On seeing the accused, the police, who were in civilian clothes, tailed it in a car until they were at the 4½ milestone, Jalan Cheras. When the car came abreast of the motorcycle the police identified themselves and ordered the two accused to stop. The motorcycle did not stop but instead it sped up a little bit. Eventually, the police car managed to squeeze the motorcycle to the sidetable, where the pillion-rider, ie the first accused, fell on the sidetable while the rider, ie the second